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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 637

BILLY E. McCLENNY, Petitioner,

v.

STATE OF COLORADO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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Opinion Below

The opinion of the Supreme Court, State of Colorado, printed in Appendix A hereto, infra, p. 7, is reported in 393 P.2d 736.

Jurisdiction

The opinion below was filed June 22, 1964. A period of fifteen days thereafter is allowed for the filing of Petition for Rehearing. Rule 39(d), Colorado Rules Criminal Procedure, Colo. S.L., 1963; Rule 118(c), Colorado Rules

Civil Procedure, 1953 C.R.S., Vol. 1. Motion to extend time for filing Petition for Rehearing to and including July 27, 1964 was filed July 1, 1964 (R. 398) and granted July 2, 1964. (R. 399) Petition for Rehearing was filed July 27, 1964 (R. 400-404) and denied August 3, 1964. (R. 405)

Jurisdiction of the Supreme Court to review this case on Petition for Certiorari rests upon 28 U.S.C. §1257(3).

Question Presented

Whether in a criminal trial the admission in evidence of a defendant's assets and worth some three years after the alleged commission of a burglary, which evidence could not have any connection either in time or amount to the crime charged, was, under the circumstances attending, prejudicial error so basic and fundamental as to deny accused that fair trial guaranteed him by the Due Process Clause, Fourteenth Amendment to the Constitution of the United States of America.

Constitutional Provision Involved

Constitution of the United States, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

In the District Court, Arapahoe County, Petitioner was charged with and pleaded not guilty to the crimes of burglary, grand larceny and conspiracy to commit each. (R. 5-11, 16) At trial the State's evidence disclosed, inter alia, commission of a burglary on October 12, 1958 by two felons, a deputy sheriff of Arapahoe County and a Denver police officer. (R. 127-129, 168, 190) Both stated Petitioner, a Denver police officer, also participated therein by pre-arrangement. (R. 133, 169, 173-180) The sum of $1,451.55 was taken in the burglary (R. 102), and, so it was said, split among the three. (R. 144)

Petitioner denied any part in the crime and stated he was home at the time. He also stated his upper torso was then in a cast immobilizing one arm. (R. 266-277) He was corroborated by his wife and mother (R. 206, 208, 261), and a physician said the cast was put on before and removed after October 12, 1958. (R. 239)

Petitioner was asked if he borrowed money from his family. Objection was made and overruled on the statement of the District Attorney that the matter would be tied in. (R. 282) Cross examination followed:

"Q. I see. Now, approximately — in approximately September, 1961, you withdrew $11,000 from the Jefferson County Bank. I would like to know where you got this money from, sir?

A. In September of 1961?

Q. $11,000 in a cashier's check on a policeman's salary of $478, money in your name, sir?

* * *

A. Yes, I withdrew it. ***" (R. 290)

Petitioner was then questioned on building homes in 1958-1961, and on the value of his home at the time of trial being $25,000. (R. 290-296) Following was redirect examination and recross examination on the same subject. (R. 314-317; R. 320-326)

Verdicts of guilt returned on all charges (R. 51-52); motion for new trial (R. 54-59) was denied (R. 65); and judgment entered with sentence of not less than six nor more than ten years. (R. 69-70)

The issue of assets and accumulation of money, after initial objection, was not raised in motion for new trial; as direct error before the Court below; and, was not considered by that Court in its opinion of June 22, 1964. (R. 390-396)

Rule 33, Colorado Rules Criminal Procedure, S.L. 1963, provides that motion for new trial "shall point out with particularity the defects and errors complained of." Rule 37(b) provides, inter alia,

> "Only questions presented in such motions (for new trial or in arrest of judgment) will be considered on review, except that plain error or defects affecting substantial rights may be noted although they were not brought to the attention of the trial court."

The Petition for Rehearing specifically raised the constitutional question presented here. (R. 401) That petition for rehearing was denied, the Court below stating,

> "The court having considered the petition of the plaintiff in error for a rehearing in said cause, and being sufficiently advised in the premises, it is this day ordered that said petition be, and the same is, denied." (R. 405)

Argument

The admission of the subject evidence before the jury deprived Petitioner his right to a fair trial. This Court has determined that the admission of such evidence constitutes reversible error. *Williams v. United States,* 168 U.S. 382. There at 396 Mr. Justice Harlan for the Court dealt with evidence relating to possession of nearly $5,000 by one accused of extorting $100 and $85.

> "The manifest object and the necessary effect of this evidence was merely to give color to the present charges, and to cause the jury to believe that the accused had in his possession more money than a man in his condition could have obtained by honest methods, and, *therefore,* he must be guilty of extorting the two sums in question."

In *Williams* it was said the evidence "did not appear to have any necessary or natural connection with the offence. • • •" 168 U.S. at 397. Here also it is without the realm of reason to suppose that the fact of Petitioner's possession of $11,000 in 1961 was or could be connected to a burglary in 1958 netting to Petitioner, so it was said, one third of less than $1,500.

The error so committed has been elsewhere specifically said to deprive an accused of fair trial. *State v. Ball,* Mo., 339 S.W. 2d 783. And if error be so fundamental as to necessarily deprive one of fair trial, due process has thereby been denied. *Lisenba v. California,* 314 U.S. 219, 236. There can be, it is respectfully submitted, no real distinction between denial of due process in criminal conviction without evidence, *Garner v. Louisiana,* 368 U.S.

157, and criminal conviction on unrelated evidence of a nature rendering trial fundamentally unfair.

The error is clear. Its nature enforces that reason warranting the grant of certiorari: the determination of the Court below denying the Petition for Rehearing is in direct conflict with the decision of this Court in *Williams*, supra, 168 U.S. 382.

Moreover if "net worth", as a method of proof, may be said the creature of this Court, then this Court should authoritatively and finally preclude its unwarranted intrusion into unintended areas.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 20324

BILLY E. McCLENNY, *Plaintiff in error,*

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Defendant in error.

McWILLIAMS, C. J.

Trial by a jury of his peers resulted in a verdict adjudging McClenny guilty of burglary, grand larceny and conspiracy to commit each of said crimes. Thereafter McClenny was duly sentenced to a term in the state penitentiary, his motion for a new trial having been denied. By the present writ of error McClenny now seeks reversal of this judgment and sentence, alleging as grounds therefor the following:

1. the evidence "considered as a whole" is legally insufficient to support the verdict;

2. the trial court erred in granting the district attorney a one day continuance to enable him to locate a "missing" rebuttal witness; and

3. a new trial should have been ordered because of newly discovered evidence.

In our view each of these contentions is without merit and the judgment must be affirmed. A brief recital of the evidence adduced upon trial will tend to put the matter in proper focus. It was established that some person or persons forcibly broke and entered the business offices of

the Lowdermilk Bakeries, Inc., situate in Arapahoe County, and then proceeded to break open the company's safe and steal therefrom some $1,400. One Arrants, a former member of the Arapahoe County Sheriff's office, and one Hutton, a former member of the Denver Police Department, were called as witnesses by the People and each detailed his particular part in this crime. Moreover, each also implicated Mr. McClenny in this Lowdermilk burglary. Specifically, Arrants testified that he had reason to believe that a considerable sum of money was kept in the Lowdermilk safe each weekend and that he communicated this fact to his close friend, McClenny. He stated that he wasn't certain whether it was his idea to burglarize the Lowdermilk premises, or McClenny's, but that on the night in question he picked up McClenny and Hutton at a prearranged meeting place and the three of them proceeded in his official car to the scene of the burglary. According to Arrants, he acted as the "lookout" while McClenny and Hutton gained entry to the office and broke open the safe.

Hutton testified that he was "lined up" for the job by McClenny, both Arrants and Hutton testifying that the two of them had never met prior to this burglary. Hutton stated that McClenny assisted him in breaking open the safe and that the money obtained from the safe was immediately split three ways.

McClenny, however, denied any participation in this burglary and, in an effort to explain away the testimony of Arrants and Hutton, he testified that each of them held a personal grudge against him. McClenny also attempted to establish an "alibi", and his testimony in this regard was to a degree corroborated by wife and mother.

Without going into any further detailing of the evidence, it is at once obvious that there was a very sharp conflict between the People's evidence and that introduced in behalf of the defendant, McClenny. If the jury chose to believe the testimony of Arrants and Hutton, certainly there was ample evidence to sustain the verdict of the jury. In support of the proposition that a criminal conviction may be grounded even on the uncorroborated testimony of an accomplice, see *Hoffman v. People,* 72 Colo. 552, 212 P. 848 and *Mendelsohn v. People,* 143 Colo. 397, 353 P. 2d 587. In the instant case, of course, the testimony of one accomplice is corroborated by that of another accomplice, a situation similar to that found in *Hamilton v. People,* 87 Colo. 307, 287 P. 651.

McClenny's "alibi" testimony, even though somewhat corroborated by his wife and mother, did no more than pose a controverted issue of fact properly to be resolved by the trier of the facts. This Court is not a fact finding body and to overturn this verdict would amount to a usurpation by us of the prime function of the jury. This Court is not charged with the duty of weighing the evidence and determining the degree of credibility which should attach to persons testifying in a trial court. It is the duty of the jury to determine where the truth lies. In short, when the evidence is considered as a whole, it is amply sufficient to support the jury's determination that McClenny was guilty of the crimes charged in the information. Stated somewhat differently, we do not regard the evidence adduced by the defendant McClenny, including the evidence that on the date of the burglary his shoulder was in a cast, to be of such an overwhelming nature as to completely neutralize the People's case. It

only served to present a disputed issue of fact which has been resolved adversely to McClenny by the jury.

After McClenny concluded his presentation of evidence the district attorney, over objection, obtained a one day continuance to permit him opportunity to subpoena as a rebuttal witness a person who was then reportedly "missing". It is contended that the district attorney made some prejudicial statements in connection with his request for a continuance in the presence of the jury and also that the press coverage of this incident was highly inflammatory and generally improper. On not one, but several occasions the jury had been instructed not to read or listen to any newspaper, radio or TV account of the trial proceedings, and there is no showing that any juror violated this instruction. The remarks of the district attorney in connection with his request for a continuance, which were made in the presence of the jury, were neither improper nor in anywise prejudicial. The matter of a one day continuance to permit the district attorney to locate this "missing witness", which incidentally the district attorney was able to do, is one which rests with the sound discretion of the trial court. See *Johnson v. People*, ... Colo. ....., 384 P. 2d 454. Suffice it to say that the trial court did not abuse its discretionary power in granting the one day continuance nor did it err in refusing to grant McClenny's motion for a mistrial based on the allegedly improper remarks of the district attorney.

McClenny finally argues that a new trial should have been ordered because of newly discovered evidence. This request was based upon an affidavit of McClenny's wife to the effect that during the trial she noticed Hutton and a rebuttal witness for the People conversing in the hall-

way at a recess of court. She claimed that she overheard Hutton tell the witness "to testify as I told you to." Mrs. McClenny apparently did not attach any particular significance to this incident at the time, as it was only *after* the jury returned its verdict that she first advised her husband's attorney of the incident. This is not such newly discovered evidence as would justify or require the granting of a new trial and the trial court committed no error in denying this request. See *Eachus v. People,* 77 Colo. 445, 236 P. 1009, where the defendant's claim of newly discovered evidence was based on an incident occurring during trial which though known to the defendant was not brought to the attention of the trial court at the time when it occurred, but was raised for the first time in a motion for new trial.

The judgment is affirmed.

Mr. Justice Day and Mr. Justice Frantz concur.

IN THE SUPREME COURT
Of The
STATE OF COLORADO

Billy E. McClenny, *Plaintiff in Error*,

20234 vs.

The People of the State of Colorado, *Defendant in Error*.

Error to the District Court
of Arapahoe County

This cause having been brought to this court by writ of error to review the judgment of the District Court of Arapahoe County, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the court that there is no error in the proceedings and judgment of said District Court.

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

By the Court. June 22, 1964.

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No. 637[redacted]

BILLY E. McCLENNY, Petitioner,

v.

STATE OF COLORADO, Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 637 Misc.

BILLY E. McCLENNY, Petitioner,

v.

STATE OF COLORADO, Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

With admirable candor, petitioner has admitted that the question he here seeks to determine was not appropriately raised in, or ruled upon by, the Colorado Supreme Court. He further admits that the only time the question was presented, in any manner, to that court was by his petition for rehearing. Thus, the question before the court at this time is whether or not the petitioner has properly raised the federal question upon which he seeks to invoke this court's jurisdiction.

ARGUMENT

In the State of Colorado, review of criminal judgments is by writ of error to the Colorado Supreme Court. Such proceedings are specifically governed by Rules 33, 34, and 37(b), Colorado Rules of Criminal Procedure (Vol. 1, Colorado Revised Statutes, 1963). Rule 37(b) provides inter alia, as pointed out by petitioner, that only questions presented in a motion for new trial (Rule 33), or in a motion in arrest of judgment (Rule 34), shall be considered on review. Petitioner did not present the issue of the effect of the so-called "net worth" testimony in his motion for new trial; therefore, as a matter of state law, this issue was not before the Colorado Supreme Court for review. *Peterson v. People*, 153 Colo....., 384 P. 2d 460.

By virtue of Rule 39(c), Colorado Rules of Criminal Procedure, the practice governing the preparation of pleadings in the Supreme Court is governed by the Colorado Rules of Civil Procedure. Rule 118(b) of the latter specifically governs petitions for rehearing, and it is clearly set forth therein that such petition is limited to "points claimed to have been overlooked or misapprehended by the court". There is no provision for raising questions not already before the court. It is further provided that the only action that will be taken by the court is the granting or the denial of the rehearing. It thus becomes clear that the state procedure does not provide for the introduction of new questions in a petition for rehearing.

In *Herndon v. Georgia*, 295 U. S. 441, 79 L. ed. 1530, 55 S. Ct. 794, a case almost strictly in point with the instant matter, this court held:

"The federal question was never properly presented to the state supreme court unless upon motion for rehearing: and that court then refused to consider it. The long established general rule is that the attempt to raise a federal question after judgment, upon petition for rehearing, comes too late, unless the court actually entertains the question and decides it. (Cases cited.)"

In view of this authority, respondent respectfully urges that the petition for writ of certiorari be denied for the reason that this court does not have jurisdiction over the question raised.

Respectfully submitted,

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